IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1407

DAVID KITSIS,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Appellate Department of the Superior

Court of the State of California for the County of Los Angeles, entered against Petitioner on December 21, 1977 in People v. David Kitsis, not issue.

OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (Appendix "A" of the Petition) is reported at 77 Cal.App.3d Supp. 1 (1977). The unpublished memorandum order of the California Court of Appeal for the Second Appellate District denying transfer of the cause after decision in the Appellate Department is attached as Appendix "B" to the Petition.

JURISDICTION

The opinion and judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was entered on December 21, 1977. Pursuant to subdivisions (b) and (c) of Rule 976 of the California Rules of Court said opinion was ordered published

by said court in the Official California Appellate Reports. Said order for publication automatically caused said opinion to be reviewed by the California Court of Appeal for possible transfer of the cause to that court pursuant to Rule 62 of the California Rules of Court. Transfer was found unnecessary by the Court of Appeal on January 11, 1978.

By denial of transfer to the Court of Appeal, the opinion and judgment rendered by the Appellate Department became a final opinion and judgment rendered in the highest court of the State in which a decision could be had. See California Penal Code § 1471; California Rules of Court, Rules 62 and 107; Smith v. California, 361 U.S. 147, 149, fn. 2 [4 L.Ed.2d 205, 208, 805 S.Ct. 399] (1959); 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner was convicted, on a plea of guilty, of one count of aiding, advising and encouraging a violation of California's "ambulance chasing" statute, California

Business & Professions Code § 6152, which provides, in pertinent part:

> "(a) It is unlawful for: (1) Any person, in his individual capacity as a public or private employee, or for any firm, corporation, partnership or association to act as a runner or capper for any such attorneys or to solicit any business for any such attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, justice courts, municipal courts, superior courts, or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever."

California Penal Code § 31 in pertinent part provides:

> "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed."

Petitioner claims the protection of the First and Fourteenth Amendments of the United States Constitution, which in material part declare:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

and

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether California Business & Professions Code § 6152 is unconstitutionally overbroad on its face, in violation of the First and Fourteenth Amendments of the United States Constitution, by abridging speech involved in solicitation by lay persons, at certain proscribed locations, of legal business on behalf of

attorneys by whom they are employed for that purpose.

STATEMENT OF THE CASE

Petitioner was convicted of a violation of California Business & Professions Code § 6152 on his plea of guilty to Count One of a multicount complaint[1/] which pleaded that he "did aid and abet and advise and encourage Esther Gonzales to, and Esther Gonzales did, between February 20 and March 10, 1974, act as a runner and capper for an attorney, David Kitsis, and solicit business for such attorney in and about a hospital from Juan Cavich."

By way of demurrer in the trial court, and on appeal in the Appellate Department of the Superior Court, Petitioner raised the contention that the statute and cause denied him rights guaranteed him by the First and Fourteenth Amendments.

1/ The remaining counts were dismissed, with Respondent's acquiescence, concurrent with the plea and sentence.

Because Petitioner's conviction is the result of his plea of guilty no factual record exists setting forth the underlying facts his plea admitted.

ARGUMENT

When this Court wrote, in Bates v. State Bar of Arizona, ___ U.S. ___, [53 L.Ed.2d 810, 826, 97 S.Ct. ___] (1977), that it "need not resolve the problem associated with in-person solicitation of clients - at the hospital room or the accident site, or in any other situation that breeds undue influence - by attorneys or their agents or 'runners'. . . .", it must have anticipated that a case requesting resolution of those problems would not be long in presenting itself before the court.

This is not the case.

Petitioner, an attorney at law, seeks resolution of those problems in a factual vacuum based on his attempt to vicariously assert his lay "runner" employee's First Amendment rights.

1. PETITIONER WAS CONVICTED OF EMPLOYING A LAY PERSON TO SOLICIT FOR HIM, AND NOT FOR DIRECT SOLICITATION OF A CLIENT. HE IS NOT ENTITLED TO VICARIOUSLY ASSERT HIS EMPLOYEE'S POSSIBLE FIRST AMENDMENT RIGHTS

California Business & Professions Code § 6152 prohibits, insofar as the criminal complaint in this case is concerned, the lay solicitation of legal employment of an attorney from a potential client in a hospital. The primary cause of Petitioner's conviction was his plea of guilty, but he was expressly charged with having aided, abetted, and advised and encouraged a lay person to act as his runner and capper in soliciting business on his behalf in a hospital. While California Penal Code § 31 made Petitioner a principal in the commission of the crime, Petitioner never personally sought to assert his First Amendment rights; indeed, he is seeking in this Court to assert First Amendment rights, if any, of his lay runner and capper to solicit business on his behalf. Nothing in California Business & professions Code § 6152 would have made criminal Petitioner's personal solicitation

(had it occurred) of the would-be client. Cf. Goldman v. State Bar, 20 Cal.3d 130 (1977), relevant to State Bar disciplinary action for such conduct.

One may not ordinarily assert another's constitutional rights; they are not vicarious. McGowan v. Maryland, 336 U.S. 420, 429, [6 L.Ed.2d 393, 401, 81 S.Ct. 1101] (1961); Broadrick v. Oklahoma, 413 U.S. 601, 610 [37 L.Ed.2d 830, 839, 93 S.Ct. 2908] (1973).

Petitioner recognizes the expressed probable non-applicability of the overbreadth doctrine in the context presented here. Bates v. State Bar, supra, ___ U.S. ___, 53 L.Ed.2d at 834. However, he perceives that standing is conferred on the basis that this is a criminal case, relying on the somewhat dubious proposition that the "in terrorem effect" of potential typical misdemeanor sentences[2/] is more likely to chill protected speech than the certainty of disciplinary action

2/ Petitioner was sentenced to pay a $500 fine and perform 500 hours of pro bono legal service through the Legal Aid Foundation or a similar organization.

by the State Bar.[3/]

Petitioner submits no authority that the rule of standing to assert overbreadth differs in criminal, quasi-criminal and civil cases, and Respondent submits the rule is at least as, and possibly more, strict in criminal cases. McGowan v. Maryland, supra; Broadrick v. Oklahoma, supra, 413 U.S. at 613, 37 L.Ed.2d at 841.

In the final analysis the narrow question here is whether "capping", "running" and "ambulance chasing" by lay persons is to be declared protected by the First Amendment, not because Petitioner may vicariously assert the constitutional rights of such lay persons, but because if the State may not criminalize such conduct without trampling on the First Amendment, Petitioner cannot be criminally liable for aiding and abeting lawful conduct.

3/ In Goldman v. State Bar of California, supra, factually similar to this case, two attorneys were suspended from the practice of law for one year and until each passed the Professionsl Responsibility Examination; also, they were required to notify all clients, opposing counsel, etc., of their suspension and disqualification, and to refund unearned fees.

2. CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 6152 AND RELATED STATUTES AND RULES AS WRITTEN AND AS CONSTRUED BY CALIFORNIA COURTS ARE NOT CAPABLE OF APPLICATION TO CONDUCT PROTECTED BY THE FIRST AMENDMENT; THEY SEEK SOLELY TO PROSCRIBE "AMBULANCE CHASING" IN ALL OF ITS CLASSIC AND RESPLENDENT GLORY

Petitioner seeks to analyze the subject with the usual overbreadth "parade of horribles", i.e., by showing conceivable hypothetical situations which might possibly arise in enforcement of § 6152.

The obvious trouble with Petitioner's analysis is that it assumes that "manifestly strong medicine" should be applied pursuant to his suggestion, rather than sparingly and as a last resort; it also assumes that California State Bar investigators (who usually prepare such cases) and California prosecutors and courts will be ignorant and insensitive to First Amendments rights and issues, and incapable of applying the law other than in an unconstitutional manner.

Reduced to its essence, Petitioner's

argument concedes that "ambulance chasing" is not entitled to First Amendment protection, it concedes the venality and mendacity of his conduct, but maintains that his conviction should nevertheless be set aside because the statute he admitted violating is (he contends) capable of construction infringing First Amendment rights.

Respondent submits that California Business & Professions Code § 6152 is not capable of application in the strictly hypothetical situations conjured by Plaintiff. For instance, subdivision (c) states: states:

> "Nothing in this section shall be construed to prevent the recommendation of professional employment where such recommendation is not prohibited by the Rules of Professional Conduct of the State Bar of California." (emphasis added)

The Rules of Professional Conduct require a pecuniary reward to flow from the attorney to the person soliciting in return for obtaining employment. California Rules of Professional Conduct, Rule 2-104(3), formerly Rule 3; Alpers v. Hunt,

86 Cal. 78 (1890); People v. Levy, 8 Cal. App.2d Supp. 763 (1935); Hildebrand v. State Bar, 18 Cal.2d 816 (1941).

Similarly, subdivision (d) of § 6152 confirms the right of a public defender or court appointed counsel to make known his availability to indigents, whether they are in or out of jail.

Petitioner has cited no case in the forty-seven year history of § 6152 or the Rules of Professional Conduct which justifies his contention that overbreadth exists. Instead, consistent construction by California Courts has limited the application of the laws and rules to those situations where the capper is remunerated for obtaining employment for a lawyer. More than a mere recommendation is required, and § 6152 does not, as Plaintiff says, establish a "blanket suppression." People v. Levy, supra, In other words, § 6152 only affects economic considerations, not constitutional rights. See McGowan v. Maryland, supra, 366 U.S. at 429, 6 L.Ed.2d at 401.

3. NO IMPORTANT INTEREST, FIRST AMENDMENT OR OTHERWISE, JUSTIFIES "AMBULANCE CHASING." STATE PROHIBITION OF "AMBULANCE CHASING" IS JUSTIFIED BY IMPORTANT AND SUBSTANTIAL INTERESTS UNRELATED TO SUPPRESSION OF FREE EXPRESSION OF IDEAS.

California Business and Professions Code § 6152 does not interfere with a consumer's right to receive information where most needed, in hospitals, jails, etc. First, the premise that one always needs the services of an attorney while still hospitalized is not necessarily valid. Subdivision (b) of § 6152 makes liability releases signed within fifteen days of hospitatlization presumptively fraudulent, and Respondent is not persuaded that a recently hospitalized or jailed consumer is in the best position to make a well reasoned decision to hire a particular attorney based on statements made by an unexpected lay solicitor. Second, nothing in § 6152 prohibits lay recommendation of an attorney, any place and any time, so long as there is no reward to the lay person for doing so. Third, it is submitted that persons hospitalized

and jailed, or their friends and relatives, are likely to and do have adequate means to assert their rights without the unexpected and uninvited solicitation of a capper. Cf. McGowan v. Maryland, supra.

This Court now has before it Ohralik v. Ohio State Bar Association, docket no. 76-1650, in which the State Bar of California has filed an amicus curiae brief. Respondent feels the interests and justifications of the State in prohibiting "ambulance chasing" are adequately set forth therein, as well as in the opinion below of the Appellate Department of the Superior Court in this case.

CONCLUSION

Albert Ohralik seeks an extension of First Amendment protection to his in-person solicitation of clients. David Kitsis seeks a further extension of that principle, if it exists at all, to the purely economic interest of lay persons to solicit and obtain clients on his behalf.

Respondent thinks that the Constitution does not set such a standard for the practice of a once, and hopefully still, honorable profession. Lest law schools begin issuing rubber-soled shoes and police radio scanners in place of diplomas, the petition should be denied.

Respectfully submitted,

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